Samsuddin bin Mohd Saad v Pengarah Hospital Bahagia, Ulu Kinta & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 21–17 OF 1990 CONSOLIDATED WITH CIVIL SUIT NO 21–48 OF 1991
KANG HWEE GEE J
15 OCTOBER 1998

Administrative Law *— Rules of natural justice — Dismissal of public servant — Disciplinary proceedings — Whether rules of natural justice were breached — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980*

Administrative Law *— Rights and liabilities of public servants — Public servant, disciplinary proceedings against — Right to cross-examine witnesses and call own witnesses — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 O 26(7)*

Administrative Law *— Rights and liabilities of public servants — Public servant, disciplinary proceedings against — Right to mitigation — Whether public servant ought to be given reasonable opportunity of being heard in mitigation before punishment imposed*

These two cases arose from the same incident and it was agreed that the court would hear evidence only in respect of the instant case, but the decision would also bind the other. The plaintiff, a former hospital attendant at the mental hospital was dismissed for assaulting a patient. The dismissal was based on a supervisor's report. Before his dismissal, he received a letter from the Public Service Disciplinary Authority requesting him to show cause why a disciplinary action with a view to dismissal should not be taken against him. The plaintiff replied, denying the charges. He was then required to attend a hearing of the Disciplinary Action Authority where he categorically denied having assaulted the patient. He was dismissed and his appeal to the Disciplinary Appeals Authority was rejected. In this action, the plaintiff claimed that in dismissing him, the defendants: (i) followed the wrong and improper procedure; (ii) did not conduct a proper enquiry to determine the truth of the allegation; (iii) denied the plaintiff the opportunity to cross-examine witnesses and to call his own witnesses in his defence at the enquiry; and (iv) denied the plaintiff the opportunity to mitigate before sentence was meted out. The plaintiff sought a declaration that his dismissal was unlawful and of no legal effect and that he was entitled to all the salaries and benefits due, and claimed damaged for wrongful dismissal and costs.

Held, dismissing both suits with costs:

(1) When a court takes upon itself to review a decision, it is in fact not only scrutinizing the tribunal's decision-making process but also the substance of the decision, and it is permissible for the court in a judicial review to examine the decision in all the instances

mentioned, not only for process but also for substance (see p 796C–D); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed. A

(2) A disciplinary proceeding under the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('the General Orders') is not a proceeding of a court of law which is bound by the srtict law of procedure and evidence. The disciplinary procedure to be followed in this case is prescribed in Part II of the General Orders, which is clearly inquisitorial as opposed to accusatorial in nature in the sense that the public servant would be called to show cause why he should not be dismissed, after the disciplinary authority had conducted an investigation and decided that there was a prima facie case for him to answer. The duty of the officer is to exculpate himself by showing cause to the contrary. The question of reversal of the burden of proof does not arise (see p 800G–I). B C

(3) There is no known procedure that allows a person being investigated to cross-examine witnesses who give statements to the investigator. The plaintiff's right to a fair hearing does not start at the investigative stage but at the hearing (see p 801A). D

(4) When a disciplinary procedure is regulated by law, it must be followed and any alleged failure of natural justice must be circumspected within the ambit of that procedure (see p 803F–G); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 followed. The Disciplinary Authority had assiduously followed the procedure laid down in the General Orders and could not be impeached on the ground that it had failed in its duty to act fairly(see p 803G–H). E

(5) Although O 26(5) of the General Orders provides that 'no documentary evidence shall be used against him unless he has been previously supplied with a copy thereof or given access thereto', the supervisor's report is not a piece of 'documentary evidence' which was intended to be 'used' against the plaintiff at the inquiry. Therefore, the defendants were entitled to rely on the report to decide on the plaintiff's guilt (see pp 803H–804B). F G

(6) Under O 26(7) of the General Orders, the right to cross-examine or question witnesses would be operative only if these witnesses were examined by the committee at the hearing. There were no witnesses examined at the inquiry (see p 804C).

(7) An officer has no right to enter a separate plea of mitigation before sentence if the disciplinary authority had made it clear in the show cause letter that the disciplinary proceeding was initiated with a view to dismiss or reduce him in rank (see p 805D–E); *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260 followed. In this case, the plaintiff had been made to understand and appreciate the seriousness of the proceeding he was facing by the inclusion in the show cause letter that it was initiated with a view to his dismissal. There was no procedural unfairness on this ground to merit a judicial review (see p 805E–G). H I

(8) There is no requirement in the General Orders that the Disciplinary Authority must conduct ground investigation by itself on the charges against the officer. Its function is only to sit in judgment after receiving a complaint of misconduct of an officer (see p 807H–I).

(9) The duty of the Disciplinary Authority in the disciplinary proceedings was to meet the demands of fairness within the province of the General Orders. The opportunity to make written representations as was accorded to the plaintiff was sufficient compliance with the demands of fairness (see p 809B); *Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280 followed.

[Bahasa Malaysia summary

Kedua-dua kes ini timbul dari kejadian yang sama dan telah dipersetujui bahawa mahkamah akan mendengar keterangan berkenaan dengan kes ini sahaja, tetapi keputusan akan mengikat yang lain itu. Plaintif, seorang bekas atendan hospital di hospital pesakit mental telah dipecat kerana menyerang seorang pesakit. Pemecatan tersebut adalah berdasarkan suatu laporan penyelia. Sebelum pemecatan beliau, beliau telah menerima sepucuk surat daripada Pihak Berkuasa Tatatertib Perkhidmatan Awam meminta beliau untuk meunjuk sebab mengapa suatu tindakan tatatertib dengan tujuan pemecatan sepatutnya tidak diambil terhadap beliau. Plaintif menjawab, menafikan tuduhan-tuduhan tersebut. Beliau kemudiannya diperlukan untuk menghadiri suatu pembicaraan Pihak Berkuasa Tindakan Tatatertib di mana beliau dengan mutlak menafikan pernah menyerang seorang pesakit. Beliau telah dipecat dan rayuan beliau kepada Pihak Berkuasa Rayuan-rayuan Tatatertib telah ditolak. Di dalam tindakan ini, plaintif mendakwa bahawa dalam memecat beliau, defendan-defendan: (i) mengikuti prosedur salah dan tidak betul; (ii) tidak mengendalikan suatu siasatan yang secukup-cukupnya untuk menentukan kebenaran pengataan tersebut; (iii) menafikan plaintif peluang untuk memeriksa balas saksi-saksi dan memanggil saksi-saksi beliau tersendiri di dalam pembelaan beliau pada siasatan tersebut; dan (iv) menafikan plaintif peluang untuk meringankan hukuman sebelum hukuman dijatuhkan. Plaintif memohon suatu deklarasi bahawa pemecatan beliau adalah menyalahi undang-undang dan tiada mempunyai kesan undang-undang dan bahawa beliau berhak kepada kesemua gaji-gaji dan faedah-faedah yang perlu diberikan, dan menuntut ganti rugi untuk pemecatan salah dan kos-kos.

Diputuskan, menolak kedua-dua tindakan dengan kos:

(1) Apabila mahkamah bertindak sendiri untuk menyemak suatu keputusan, ia adalah sebenarnya bukan sahaja meneliti proses membuat keputusan tribunal tersebut tetapi juga isi keputusan tersebut, dan adalah dibenarkan untuk mahkamah di dalam

semakan kehakiman untuk memeriksa keputusan tersebut di dalam kesemua keadaan-keadaan yang disebutkan tersebut, bukan sahaja proses tetapi juga untuk kandungannya (lihat ms 796C–D); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ diikut.

(2) Prosiding tatatertib di bawah Peraturan-peraturan Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 ('Peraturan-peraturan Am tersebut') bukannya suatu prosiding mahkamah undang-undang yang terikat oleh prosedur undang-undang dan keterangan yang ketat. Prosedur tatatertib untuk diikuti di dalam kes ini adalah diperuntukkan oleh Bahagian II Peraturan-peraturan Am tersebut, yang mana adalah jelasnya berbentuk penyiasatan bertentangan dengan penuduhan dari segi bahawa pegawai awam akan dipanggil untuk menunjuk sebab mengapa beliau tidak patut dipecat, setelah pihak berkuasa tatatertib telah mengendalikan suatu siasatan dan memutuskan bahawa terdapatnya suatu kes prima facie untuk beliau menjawab. Tanggungjawab pegawai tersebut adalah untuk membebaskan dirinya dengan menunjukkan sebab sebaliknya. Persoalan penukaran beban bukti tidak timbul (lihat ms 800G–I).

(3) Tidak terdapat prosedur yang diketahui yang membenarkan seseorang yang di bawah siasatan untuk memeriksa balas saksi-saksi yang memberi pernyataan-pernyataan kepada penyiasat. Hak plaintif kepada suatu pembicaraan yang adil tidak bermula pada tahap penyiasatan tetapi pada pembicaraan (lihat ms 801A).

(4) Apabila suatu prosedur tatatertib adalah dikawal oleh undang-undang, ia mesti diikuti dan apa-apa yang dikatakan kegagalan keadilan semula jadi mesti diteliti dalam lingkungan prosedur tersebut (lihat ms 803F–G); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 diikut. Pihak Berkuasa Tatatertib telah dengan teliti mengikut prosedur yang ditetapkan di dalam Peraturan-peraturan Am tersebut dan tidak boleh dicabar atas alasan bahawa ianya telah gagal di dalam tanggungjawabnya untuk bertindak dengan adil (lihat ms 803G–H).

(5) Walaupun Peraturan 26(5) Peraturan-peraturan Am tersebut memperuntukkan bahawa 'tiada keterangan dokumentar seharusnya digunakan terhadap beliau kecuali beliau telah sebelumnya telah dibekalkan dengan sesalinan atau diberikan akses kepadanya', laporan penyelia tersebut bukannya suatu 'keterangan dokumentar' yang mana adalah diniatkan untuk 'digunakan' terhadap plaintif pada siasatan. Maka, defendan-defendan adalah berhak berdasarkan laporan tersebut untuk memutuskan atas kebersalahan plaintif (lihat ms 803H–804B).

(6) Di bawah Peraturan 26(7) Peraturan-peraturan Am tersebut, hak untuk memeriksa balas atau menyoal saksi-saksi akan berkuat

kuasa hanya jika saksi-saksi telah diperiksa oleh jawatankuasa pada pembicaraan tersebut. Tidak terdapat saksi-saksi yang diperiksa pada siasatan tersebut (lihat ms 804C).

(7) Seorang pegawai tidak berhak untuk memasukkan rayuan meringankan hukuman yang berasingan sebelum hukuman jika pihak berkuasa tatatertib telah menyatakan dengan jelasnya di dalam surat tunjuk sebab bahawa prosiding tatatertib adalah dimulakan dengan tujuan memecat atau menurunkan pangkat (lihat ms 805D–E); *Inspector General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260 diikuti. Di dalam kes ini, plaintif difahamkan dan menyedari sepenuhnya betapa seriusnya prosiding yang dihadapinya melalui penyertaan di dalam surat tunjuk sebab tersebut bahawa ia adalah dimulakan dengan tujuan untuk memecat beliau. Tiada terdapatnya ketidakadilan prosedural atas alasan ini yang mewajarkan suatu semakan kehakiman (lihat ms 805E–G).

(8) Tidak terdapat keperluan di dalam Peraturan-peraturan Am tersebut bahawa Pihak Berkuasa Tatatertib mesti mengendalikan siasatan asas dengan tersendirinya ke atas tuduhan-tuduhan terhadap pegawai tersebut. Fungsinya hanya mengadakan perbicaraan setelah menerima suatu aduan salah laku seseorang pegawai (lihat ms 807H–I).

(9) Tanggungjawab Pihak Berkuasa Tatatertib di dalam prosiding tatatertib adalah untuk memenuhi tuntutan-tuntutan keadilan di dalam lingkungan Peraturan-peraturan Am tersebut. Peluang untuk membuat pernyataan-pernyataan bertulis seperti mana yang telah diberikan kepada plaintif adalah pematuhan mencukupi dengan tuntutan-tuntutan keadilan (lihat ms 809B); *Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280 diikut.]

Notes

For cases on breach of the rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 461–465.

For a case on termination of service of member of public service, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 451.

For cases on the rights and liabilities of public servants, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 404–452.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (distd)

Civil Service Unions v Minister for Civil Service [1995] AC 374 (folld)

Ganasan a/l Marimuthu v Public Services Commission & Anor [1998] 4 MLJ 280 (folld)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (folld)

Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260 (folld)
Local Government Board v Arlidge [1915] AC 120 (refd)
Puhlhofer & Anor v Hillingdon London Borough Council [1986] AC 484 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (folld)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308 (refd)
Utra Badi a/l K Perumal v Lembaga Tatatertib Perkhidmatan Awam & Anor [1998] 3 MLJ 676 (not folld)

Legislation referred to

Federal Constitution arts 132(2), 135(2), 144(1)
Mental Disorders Ordinance 1952 s 66(1)
Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 general orders 3, 22, 23, 24, 25, 26

Gurbachan Singh (*Bachan & Kartar*) for the plaintiff
Shahidani bin Abd Aziz (Senior Federal Counsel) for the defendants

Kang Hwee Gee J: The case for the plaintiff.

The plaintiff was a hospital attendant of the mental hospital, Hospital Bahagia, Ulu Kinta, Perak.

He was on night duty at Ward II between the hours of 9.00 pm on 19 June 1988 until 7.00 am the next day.

According to the plaintiff, at about 9.50 pm on 19 June 1988, he noticed a mental patient Lee Heng Siong, an inmate of the ward becoming violent and was assaulting another patient. He knew Lee as a habitually violent patient who had a history of assault on several patients and staff members including a doctor. He sought the assistance of En Rosli bin Ismail, a junior hospital assistant to control the patient. The immediate head of the ward, another hospital assistant En Kassim bin Mohamad was duly informed and on his instruction the patient was ordered to be tied to his bed.

At about 2.30 am (20 June), the patient managed to untie his hands, when it became necessary for him and Kassim to retie him. Later at about 6.50 am, the plaintiff heard a scream from the ward. He went to investigate and discovered that the patient was assaulted by Rosli bin Ismail with a rubber hose.

On 21 June 1988 at about 2.00 pm, the plaintiff was called to the office of the supervisor where he gave an explanation of the events of what transpired at Ward II while he was on duty.

Contrary to his expectation, on 28 July 1988 the plaintiff received an undated letter from the Pengerusi, Lembaga Tatatertib Perkhidmatan Awam, Kumpulan C and D, Hospital Bahagia Ulu Kinta, Perak Darul Ridzuan alleging that he had on 19 June 1988 at 9.30 pm and at 2.30 am on 20 June 1988, assaulted the patient Lee Heng Siong and requesting him to show cause why a disciplinary action with a view to dismissal

should not be taken against him under Perintah Am Bab 'D' 1980. The letter reads as follows:

> Bil (28) dlm HBUK PK (5)983 Lampiran 'B'
>
> Encik Shamsudin bin Md Saad
>
> Melalui: Penyelia Hospital,
> dan Hospital Bahagia Ulu Kinta,
> Salinan Perak Darul Ridzuan
>
> Tuan,
>
> *Pertuduhan Bagi Maksud Mengambil Tindakan Tatatertib*
>
> Satu laporan telah diterima memaklumkan bahawa tuan, En Shamsudin bin Md Saad seorang Atendan Hospital Otak telah didapati melakukan kesalahan berikut di Wad II lelaki semasa tuan bertugas giliran malam.
>
> (a) Pada 19 Jun 1988, jam 9.30 malam, tuan telah didapati menumbok pesakit En Lee Heng Siong beberapa kali apabila pesakit menjadi agresif dan cuba menyerang tuan; dan
>
> (b) Pada 20 Jun 1988, jam 2.30 pagi, tuan telah didapati memukul pesakit yang sama dengan hos getah semasa pesakit cuba melepaskan dirinya dari ikatan.
>
> 2 Tuan adalah dengan itu telah melanggar syarat-syarat perkhidmatan yang terdapat di dalam Perintah Am Bab D 1980 perenggan 4(2)(g) yang mana boleh diertikan sebagai tidak bertanggungjawab.
>
> 3 Mengikut Perintah Am Bab 'D' 1980 tuan adalah dengan ini diminta memberi jawapan kepada pertuduhan-pertuduhan yang dikemukakan itu, dan memberi sebab-sebab mengapa tindakan tatatertib untuk tuan dibuang kerja sepatutnya tidak diambil terhadap tuan. Jawapan dan hujah-hujah tuan itu hendaklah dikemukakan melalui Ketua Jabatan tuan dalam tempoh 14 hari daripada tarikh tuan menerima surat ini. Sekiranya tuan tidak memberi sebarang jawapan dalam tempoh masa yang di tetapkan itu, tuan akan dianggap sebagai tidak hendak membela diri, dan perkara ini akan terus diputuskan di atas keterangan-keterangan yang ada sekarang ini sahaja.
>
> 4 Sila tuan akui penerimaan surat ini.
>
> Saya yang menurut perintah,
>
> tt
> Pengerusi
> Lembaga Tatatertib Perkhidmatan Awam,
> Kumpulan C & D,
> Hospital Bahagia Ulu Kinta
> Perak Darul Ridzuan

By a letter dated 1 August 1988, he replied denying that he had assaulted the patient. It read as follows:

> Shamsudin bin Saad
> Atendan Hospital Otak No 411
> Hospital Bahagia
> Ulu Kinta, Perak Darul Ridzuan

Melalui: Penyelia Hospital 1 Ogos 1988

Pengerusi
Lembaga Tatatertib Perkhidmatan Awam,
Kumpulan C dan D,
Hospital Bahagia Ulu Kinta
Perak Darul Ridzuan

Tuan,

Pertuduhan Bagi Maksud Mengambil Tindakan Tatatertib

Dengan hormatnya dimaklumkan, saya merujuk surat tuan Bil (28) dlm HBUK PK (S)983 yang saya terima pada 28 Julai 1988 berkaitan perkara yang tersebut di atas.

(a) Untuk makluman tuan, sudah menjadi tanggungjawab saya, seperti biasa pada malam 19 Jun 1988 saya bertugas malam di Wad II, terlebih dahulu memastikan pesakit dengan secukupnya, dan tidak berlaku kejadian apa-apa kepada pesakit di dalam jagaan saya, semasa saya sedang mengira pesakit di dalam wad tersebut, saya dapati pesakit Lee Heng Siong berjalan mundar-mandir di dalam wad yang berkenaan, dan saya menegurnya balik ke tempat tidurnya, tetapi tidak dihiraukan, dengan tampa saya sedari beliau terus menyerang saya dari belakang serta menumbuk dan berpaut badan saya cuba untuk merebahkan diri saya, di dalam pergelutan untuk saya menyelamatkan diri saya dengan pesakit berkenaan yang begitu agresif sekali dan tiba-tiba datang pembantu hospital rendah (En Rosli) membantu saya di dalam keadaan terdesak untuk meleraikanya, seterusnya beliau memberitahu kejadian yang berlaku kepada pembantu perubatan yang bertugas malam yang tersebut. Apa yang mendukacita di atas tuduhan yang dihadapkan kepada saya amatlah menyedihkan, bukan saja saya diserang oleh pesakit itu bahkan saya juga ditumbuk dan hampir-hampir saya tewas kepada pesakit yang berkenaan, mujurlah saya dapat dibantu olih rakan saya.

(b) Berhubung tuduhan saya memukul pesakit pada jam 2.30 pagi, tuduhan ini saya nafikan sama sekali, selepas kejadian yang berlaku pada jam 9.30 malam pesakit tersebut telah pun diarahkan oleh pembantu perubatan, mengikat kedua belah tangan pesakit, pada masa saya hendak pergi ke jamban tujuan untuk membuang air kecil, pada ketika itulah lebih kurang jam 2.30 pagi saya dapati ikatan yang diikat pada tangan pesakit telah pun terhurai sebelah tangan, maka saya pun memanggil meminta pertolongan daripada pembantu perubatan (En Kassim) mengikatnya kembali, tidaklah pula saya memukulnya dengan hos getah sebagaimana yang dituduh, untuk ini saya berani bersumpah yang saya tidak melakukan perbuatan yang sekejam itu kepada pesakit yang berkenaan.

(c) Oleh yang demikian dengan adanya kenyataan saya ini, saya sangat-sangat berharap dapat kiranya tuan menyiasat keadaan yang sebenarnya agar saya dapat diberi pertimbangan dengan seadil-adilnya sebagaimana hamba Allah yang dituduh.

Sekian salam hormat dari saya.

Saya yang benar
tt

By a letter dated 9 September 1988, he was informed by the first defendant that the Lembaga Tindakan Tatatertib would be sitting on 13 September 1988 and he was required to attend.

On 13 September 1988, the Lembaga sat to hear his case. He attended the hearing wherein he categorically denied having assaulted the patient as alleged in the charges against him in the letter requesting him to show cause.

At the hearing however, he did not apply to cross-examine the witnesses whom he alleged were called to give evidence against him as he was not informed that he could do so.

By a letter dated 15 September 1988, the Pengerusi Lembaga Tatatertib informed him on the Lembaga's decision to dismiss him. The letter read as follows:

Bil (34) dlm HBUK PK (S) 983 Lampiran 'E'

Tindakan Tatatertib Tarikh: 15 September 1988

En Shamsudin bin Md Saad
Atendan Hospital Otak 411
Hospital Bahagia, Ulu Kinta

Melalui Penyelia Hospital
dan Hospital Bahagia
Salinan Ulu Kinta, Perak Darul Ridzuan

Lembaga Tatatertib di dalam mesyuarat pada hari Selasa 13 September 1988 setelah menimbangkan dengan teliti pertuduhan ke atas tuan dan jawapan yang diberi oleh tuan dan lain-lain maklumat yang berkaitan, memutuskan bahawa tuan dikenakan hukuman seperti berikut:

Buang Kerja dengan Serta-merta

2 Mengikut Peraturan 12(1) dan 13(1) Peraturan-peraturan Lembaga Tatatertib Perkhidmatan Awam 1972 (PU [A] 48), tuan adalah dengan ini diberi peluang untuk membuat rayuan kepada Lembaga Rayuan Tatatertib melalui Ketua Jabatan tuan di dalam tempoh 14 hari mulai dari tarikh penerimaan keputusan Lembaga Tatatertib ini.

Sekian.

Saya yang menurut perintah,

tt
(Hj [Dr] Abdul Aziz Abdullah)
Pengerusi
Lembaga Tatatertib Perkhidmatan Awam
Kumpulan C dan D
Hospital Bahagia
Ulu Kinta, Perak Darul Ridzuan.

As advised, he appealed by letter dated 26 September 1988 addressed to the Pengerusi, Lembaga Rayuan Tatatertib. He was informed by a letter dated 21 December 1988 from Pengerusi, Lembaga Rayuan Tatatertib, Suruhanjaya Perkhidmatan Awam, Malaysia, Kuala Lumpur that his appeal was rejected.

The plaintiff claimed that in dismissing him, the defendants:

(i) followed a wrong and improper procedure;

(ii) did not conduct a proper enquiry to determine the truth of the allegation;

(iii) denied the plaintiff the opportunity to cross-examine witnesses and to call his own witness in his defence at the enquiry; and

(iv) denied the plaintiff the opportunity to mitigate before sentence was meted out.

He sought a declaration that his dismissal as hospital assistant by the defendants was unlawful and of no legal effect and that he was entitled to all the salaries and benefits due in such employment and that an ancilliary order that an enquiry be held to determine the amount due.

He also claimed damages for wrongful dismissal and costs.

The trial

The plaintiff gave evidence for himself.

He said he attended the inquiry on 13 September 1988 conducted by the Lembaga Tatatertib to answer the two charges against him. He did not make any application to cross-examine any witnesses called against him relating to the two charges and neither was he informed of his right to question any witness. In any case, no witness was present at the inquiry.

The defendants called four witnesses including the supervisor of the hospital, Ong Lee Hui (DW1) who investigated the incident and Dato' Dr Abdul Aziz bin Abdullah, (DW2), the Pengarah of the Hospital Bahagia and who constituted the Lembaga Tatatertib and who also chaired the Committee of Inquiry which sat on 13 September 1988 to hear a disciplinary proceeding against the plaintiff.

According to Ong, he submitted a report (Agreed Bundle 1 at pp 9–14) of the interviews he conducted with persons who are involved or connected with the incident including the plaintiff and the alleged victim. He admitted that in this report he did not state his view on the culpability of the plaintiff. But in a separate letter (Agreed Bundle at p 8) to the Pengarah of the hospital, he had stated that from the evidence he obtained in the inquiry, he found that the plaintiff and two other persons (including the plaintiff in Civil Suit No 21–48–91) had been involved in assaulting the patient Lee Heng Siong. He recommended that disciplinary proceedings be taken against them. The letter read as follows:

Bahagian Penyeliaan Hospital
Pejabat Penyelia Hospital
Hospital Bahagia
Ulu Kinta
Perak Darul Ridzuan

Bil (37) dlm BPH HBUK PK 2/88
Tarikh: 2 Julai 1988

Pengarah

Hospital Bahagia
Ulu Kinta
Perak Darul Ridzuan

Tuan,

Syor Mengambil Tindakan Tatatertib ke atas
(1) Encik Kassim bin Mohamad — Pembantu Perubatan
(2) Encik Rosli bin Ismail — Pembantu Hospital Rendah
(3) Encik Samsudin bin Md Saad — Atendan Hospital Otak No 411

Berhubung dengan perkara di atas, bersama-sama ini disertakan satu salinan kertas penyiasatan berkaitan dengan kes memukul pesakit-pesakit, PK 031805 En Lee Heng Siong dan PK 038963 Encik Jeswandy bin Borhan.

2 Insiden-insiden memukul pesakit-pesakit ini berlaku di Wad II Laki-Laki, melibatkan ketiga-tiga orang kakitangan yang tersebut di atas yang bertugas giliran malam pada 19 Jun 1988.

3 Dari keterangan-keterangan yang diperolehi melalui siasatan ini, ia menunjukkan bahawa ketiga-tiga orang kakitangan di atas telah terlibat dengan perbuatan memukul pesakit, sekurang-kurangnya dalam salah satu dari tiga insiden-insiden yang berlaku sepanjang giliran tugas malam mereka pada 19 Jun 1988.

4 Saya dengan ini mengesyorkan kepada tuan supaya dapat mengambil tindakan tatatertib yang sewajarnya ke atas ketiga-tiga kakitangan diatas.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'CINTAILAH BAHASA KITA'

Saya yang menurut perintah,

tt
(Ong Lee Hui)
Penyelia Hospital
Hospital Bahagia Ulu Kinta
Perak

According to Dato' Dr Abdul Aziz, in the enquiry the plaintiff denied the charges. No witness was called but the supervisor's report was read to the plaintiff before he made his representation to the committee.

The Lembaga, he said, decided to dismiss the plaintiff after hearing him and after having considered the report and findings of Ong Lee Hui, the supervisor of the hospital who conducted the investigation into the incident, the charges that had been made against the plaintiff and the medical report of the mental patient Lee Heng Siong who was alleged to have been assaulted. It also considered the provision of s 66(1) of the Mental Disorders Ordinance 1952, with regard to the ill-treatment of mental patients and the plaintiff's reply to the show cause letter (Agreed Bundle at p 4).

The Law

In order to comprehend and consider the procedural improprieties complained of, reference must now be made to the relevant law on judicial review vis-a-vis the procedure that is followed or ought to be followed in the disciplinary proceeding to which the plaintiff had been subjected to.

The traditional view that the courts have always regarded itself as having a purely supervisory jurisdiction over inferior tribunals or bodies exercising judicial or quasi-judicial functions and would commit itself to review only the decision making process of that tribunal or body but not the decision itself, appears to have been somewhat redefined by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. The court has now made it clear firstly, that when the court takes upon itself to review a decision, it is in fact not only scrutinising the tribunal's decision-making process but also the substance of the decision, and secondly, that it is now permissible for the court in a judicial review to examine the decision in all the instances mentioned not only for process but also for substance (see article by Sudha CKG Pillay — 'The Ruling in Ramachandran — A Quantum Leap in Administrative Law?' [1998] 3 MLJ lxii at p lxv).

The ambit within which the court would be prepared to commit itself to review an administrative action can now be authoritatively quoted from the following passage in the speech of Lord Diplock in *Civil Service Unions v Minister for Civil Service* [1985] AC 374, which was cited with approval by Edgar Joseph Jr FCJ in his speech in *R Rama Chandran*:

> In this context it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit: (i) illegality; (ii) irrationality; and (iii) procedural impropriety. This is how he put it:
>
> > 'By "illegality" as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

A I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'

B

The relevant provisions of the General Orders under which the disciplinary proceeding was conducted

C The conditions of service of persons in the public services (of which the plaintiff was one) is regulated by the Yang di Pertuan Agong under art 132(2) of the Federal Constitution by a series of orders known as the General Orders.

Matters relating to discipline are presently governed by the Perintah-Perintah Am Bab 'D' Peraturan-Peraturan Lembaga Tatatertib D Perkhidmatan Awam 1993.

In the instant case however, the disciplinary proceeding against the plaintiff was conducted under the then subsisting Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980. The procedure that must be followed by the Lembaga Tatatertib in instituting a disciplinary E proceeding is laid down in Part II Disciplinary Procedure.

The relevant provisions read as follows:

23 In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard:

F

Provided that this General Order shall not apply to the following cases:

(a) where the appropriate Disciplinary Authority is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of this General Order; or

(b) Where the Yang di-Pertuan Agong is satisfied that in the interest of G the security of the Federation or any part thereof it is not expedient to carry out the requirements of this General Order.

24 In every case of an alleged breach of discipline by any officer except as provided for under General Order 27(a) and (b), the Chairman of the Appropriate Disciplinary Authority shall, in the first instance, before commencing any disciplinary proceeding in the matter, consider whether H the breach of discipline complained of is a nature which merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.

25 (1) Where the Chairman of the Appropriate Disciplinary decides under General Order 24 that the breach of discipline alleged merits punishment lesser than dismissal or reduction in rank, the officer I shall be informed in writing of the facts of the breach of discipline alleged against him and be given an opportunity of making a representation in writing, against the allegation.

(2) After considering the representation under para (1), the Appropriate Disciplinary Authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall impose any one or more of the punishments specified in General Order 36.

26 (1) Where it is represented to, or is found by the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a prima-facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determined, shall be required to appear before the Committee and exculpate himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission:

A Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be B furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the C Committee for further inquiry and report.

(11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion —

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

D (b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt E with under the Pensions Act.

The rudiments of the disciplinary procedure of civil servants was not adequately laid out before the court. In order that the plaintiff's case can be properly understood the function of the Lembaga Tatatertib in this case requires some clarification.

F The authority that is empowered to initiate a disciplinary proceeding against a public officer is the 'Appropriate Disciplinary Authority' referred to in O 3. Under this order, that authority is the Service Commission to which the officer belonged, in the case of the plaintiff, the Public Services Commission. For administrative convenience however, the commission does not exercise this function directly but delegates it to the head of the G establishment under which the officer serves (in the case of the plaintiff, the Pengarah Hospital Bahagia) by virtue of the same O 3 read with art 144(1) of the Federal Constitution.

The 'Appropriate Disciplinary Authority' (referred to in Bahasa Malaysia as the Lembaga Tatatertib) in the instant case is, therefore, for all H intents and purposes a singular person, namely the Pengarah of the Hospital Dr Abdul Aziz bin Abdullah (DW2). He also chaired the Committee of Inquiry together with two other members before whom the plaintiff appeared on 13 October 1988.

Submissions of counsel for the plaintiff I

That the Lembaga Tatatertib and the Committee of Inquiry before whom the plaintiff appeared on 13 September 1988 had been legally constituted under the General Orders was not disputed by the plaintiff.

The plaintiff's challenge was directed specifically on the procedural propriety of the inquiry conducted by Lembaga Tatatertib which counsel for the plaintiff in his written submission submitted was in breach of natural justice on grounds which may be summarised as follows:

(1) The procedure adopted by the Lembaga at the proceeding was such as to require the plaintiff to prove that he did not assault the patient when it was the defendant's duty to prove the charges against the plaintiff.

(2) The report of the supervisor was not made available to the plaintiff before he was called to attend the proceeding on 13 August 1988.

(3) The plaintiff was denied the opportunity to call his own witness and to cross-examine witnesses at the proceeding.

(4) The plaintiff was not allowed the opportunity to mitigate before the punishment was meted out.

(5) The plaintiff was not given the opportunity to appear at the investigation stage to cross-examine witnesses.

(6) The Lembaga in dismissing the plaintiff did not come to an independent decision having relied only on the report of the investigation of the Supervisor Ong Lai Hui with regard to the culpability of the plaintiff.

I shall now consider the submissions in turn, though, not necessarily in the order in which they were presented.

Procedure adopted and the burden of proof

A disciplinary proceeding under the General Orders is not a proceeding of a court of law which is bound by the strict law of procedure and evidence. Unlike a court law or a tribunal, to quote MP Jain, the learned author of *Administrative Law of Malaysia and Singapore* (3rd Ed) at p 217:

> ... in an inquiry, the inquiry officer does not make any decision; he reports his findings to some higher administrative authority which makes the decision as to the action to be taken thereon. The purpose of holding an inquiry is primarily to gather information and ascertain facts on the basis of which a decision may then be made.

In the instant case, the disciplinary inquiry must be conducted in accordance with the statutory provisions of the Public Officers (Conduct and Discipline) (Chapter 'D'), Part II Disciplinary Procedure. The disciplinary procedure prescribed therein is clearly inquisitorial as opposed to accusatorial in nature, in the sense that the public servant would be called to show cause why he should not be dismissed, after the disciplinary authority had conducted an investigation and decided that there was a prima facie case for him to answer. The duty of the officer is to exculpate himself by showing cause to the contrary.

The question of the reversal of the burden of proof as submitted by counsel, therefore, does not arise.

The right to cross-examine witnesses at the investigation stage

There is no known procedure that allows a person being investigated to cross-examine witnesses who give statements to the investigator. An investigation is not a hearing. The plaintiff's right to a fair hearing does not start at the investigative stage but at the hearing.

I am also unable to find any truth in counsel's submission that since the Lembaga had acted merely on the report of the supervisor and since the plaintiff was not afforded the opportunity to cross-examine the witnesses interviewed by the supervisor, the plaintiff may be found guilty on an untrue or biased report. Assuming that the report was flawed (in the sense that it may not have disclosed his culpability), and the Lembaga had relied upon it to find the plaintiff guilty, such a finding would constitute a procedural impropriety which would be readily reviewed by the court.

Use of documentary evidence at the inquiry and failure to supply a copy to plaintiff

The case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 was relied upon by counsel to support the submission that a failure to furnish a copy of the supervisor's report to the plaintiff constitutes a failure to afford the plaintiff a reasonable opportunity of being heard.

In that case, a police inspector facing a disciplinary proceeding was not furnished with a copy of the findings of the Board of Inquiry beforehand before he appeared before the adjudicating officer who had in fact decided on his fate based on the findings of the Board of Inquiry which contained the prejudicial evidence of each witness heard by the Board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement. It was held by the Privy Council on appeal from the Court of Appeal Malaya (per Lord Denning) that:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179, 182; 27 TLR 378 down to the decision of their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risks of it is enough ...
>
> Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard ... The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships

> do not think it was correct to let him have the report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Surinder Singh Kanda, I must admit, is the leading authority not only in this country but also in other common law jurisdictions on that cherished principle of natural justice — audi alteram partem. However, its applicability in respect of cases involving the disciplinary actions of civil servants of today with respect to their right to be supplied with documents in the hands of the disciplinary authority must necessarily be limited. The disciplinary proceedings against the Police Inspector in that case was conducted just after Merdeka in April 1958 under what was known as the Orderly Room Procedure in the Police Regulations then in force — a procedure very much less comprehensive than the 1980 General Orders. Consequently the Privy Council was not in a position then in that case to consider the extent to which the rule of fair hearing could be interposed by statutory requirements. Although subsequently, *Surinder Singh Kanda* came to be extensively cited for what it is worth (and recently by the Court of Appeal in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308) the extent to which such a right can be regulated by statute had not been properly addressed until the Supreme Court case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114.

In that case, the appellant police inspector was dismissed pursuant to a disciplinary proceeding convened under O 26, as in the instant case. He was served with a show cause letter why he should not be dismissed after it was represented to the disciplinary authority that he was guilty of eight charges of unsatisfactory work or misconduct. The appellant replied to the letter denying the charges but the authority decided nevertheless to dismiss him without affording him an oral hearing under O 26(4). The Supreme Court had to consider, among others, the submission that there was a breach of natural justice in not providing the appellant with that oral hearing, considering the fact that dismissal was a serious matter which will affect his livelihood. It was held that the oral hearing referred to in O 26(4) may only be granted if the disciplinary authority considered that the case against the appellant required 'further clarification' in which case, it was obliged to appoint a committee of inquiry for the purpose.

Jemuri Serjan CJ (Borneo) speaking for the panel in dismissing the appeal said:

> ... Under para 4 of the said General Order, only if the respondent considers that the case against the appellant requires further clarification that he is obliged to appoint a committee of inquiry. In such an event, both parties may be legally represented. Under the circumstances, the procedure adopted by the respondent, in our view, did not in any way involve prejudice to the appellant. In this respect, it would be illuminating to reproduce a passage in the judgment of Lord Bridge of Harwich in *Lloyd v McMahon & Anor* [1987] AC 625; [1987] 1 All ER 1118; [1987] 2 WLR 821, as it is relevant to the issue under consideration. At p 702, Lord Harwich said:

> 'My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. It follows that the starting-point for the examination of all the appellants' submissions on this aspect of the case is the Act of 1982 ...'

Similarly, in this case, we have examined the relevant provisions of Ch D of the 1980 General Orders, and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry under the circumstances of this case was not justified. In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v Randwick Municipal Council* [1976] 136 CLR 106 at p 110:

> '... if the legislation has made provision for that opportunity to [be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.'

Apart from providing the narrow ratio that it is not mandatory to provide an oral hearing, *Ghazi*'s case also provides the wider ratio that when a disciplinary procedure is regulated by law, it must be followed and that any alleged failure of natural justice must be circumspected within the ambit of that procedure. The General Orders, it is clear, did not make any provision that the disciplinary authority must supply any documents to an officer before he could make his representation in writing to exculpate himself under O 26(2). Neither did it make any provision that any document must be supplied to him when he is called to appear before the Committee of Inquiry for 'further clarification' pursuant to O 26(5), save that O 26(7) provides that 'no documentary evidence shall be used against him unless he has been previously supplied with a copy thereof or given access thereto'. Applying the ratio in *Ghazi* it follows that since the Lembaga had been assiduously following the procedure laid down, it could not be impeached on the ground that it had failed in its duty to act fairly, if indeed it had not supplied the supervisor's report to the plaintiff — unless that report can be construed

under O 26(7) to be a piece of 'documentary evidence' which was intended to be 'used' against the plaintiff at the inquiry in which case a failure to supply the plaintiff with a copy thereof may constitute a procedural impropriety. But it is clear, the report was not a piece of documentary evidence as opposed to merely a document. It merely contains the investigative summary of what had been previously submitted to the Lembaga for its deliberation into the charges against the plaintiff. It is also clear that the report was not 'used' against the plaintiff as according to Dato' Dr Abdul Aziz (DW1), it was merely read to the plaintiff for his benefit.

The right to cross-examine and to call his own witness

Again applying the same restrictive principle referred to in *Ghazi*, it is clear that the plaintiff's right to cross-examine witnesses is also necessarily restricted by O 26(7). The right to cross-examine or question witnesses would be operative only if these witnesses were examined by the committee at the hearing. But no witness was examined at the inquiry. This is clear from the evidence of Dato' Dr Abdul Aziz.

Mitigation before sentence

To consider the submission, it is first necessary to examine within the context of the General Orders whether an officer has the right to plead in mitigation as a separate exercise before the disciplinary authority decides to dismiss him. The authority on this point is to be found in the Supreme Court case of *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260.

In that case, a show cause letter to a police inspector which was instituted under the previous General Orders 'D' 30 (the equivalent of O 26 in the instant case) failed to state therein the disciplinary proceeding was initiated with a view to dismissal or reduction in rank of the officer. This notwithstanding, the disciplinary authority acted to dismiss the said officer.

The trial judge of the High Court, Ajaib Singh J, was minded to find that there was an implied right of the inspector to plead in mitigation before punishment of dismissal was imposed upon him in the following words:

> The plaintiff sent a reply to the Deputy Inspector-General of Police on 7 June 1980 giving his explanations on the three charges. After considering these explanations and having found that the plaintiff had failed to exculpate himself it was incumbent upon the Inspector-General of Police thereafter to give the plaintiff an opportunity to make a plea in mitigation on punishment. This right of the plaintiff to be heard in mitigation is implied in reg 27 of the General Orders and in art 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard. He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him?

On appeal, Salleh Abas LP, speaking for the Supreme Court held that the above passage was misleading and should be read in the context of the factual situation of that case. This was what he said:

> As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated 14 May 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. If however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as 'This proceeding is taken against you with a view to dismissal or reduction in rank ...' or 'This proceeding is taken under GOD 30 with a view to dismissal or reduction in rank ...', or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what it would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is being imposed.

This above passage could only be interpreted to mean that an officer has no such right to enter a separate plea of mitigation before sentence if the disciplinary authority had made it clear in the show cause letter that the disciplinary proceeding was initiated with a view to dismiss or to reduce him in rank. That right, it would appear from the judgment, had been construed to be no more inclusive than the right to make representation to exculpate himself which the plaintiff in the instant case was bound to make under O 26(2).

To decide whether there was procedural unfairness to merit a judicial review on this ground therefore, one needs to ask the question whether the plaintiff in the present case had been made to understand and appreciate the seriousness of the proceeding he was facing by the inclusion in the show cause letter that it was initiated with a view to his dismissal. That letter (Agreed Bundle 2 at p 2) was unequivocal in purpose — the plaintiff was required to show cause why he should not be dismissed in the following words appearing in para 3:

> Mengikut Perintah Am Bab 'D' 1980 tuan adalah dengan ini diminta memberi jawapan kepada pertuduhan-pertuduhan yang dikemukakan itu, dan memberi sebab-sebab mengapa tindakan tatatertib untuk tuan dibuang kerja sepatutnya tidak diambil terhadap tuan.

In the event, I am inclined to find that there is no merit on the submission.

Before I leave this issue however, I must express my view on the very recent decision in *Utra Badi a/l K Perumal v Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 3 MLJ 676, which appears to be at variance with my decision.

In that case, Vincent Ng J of the Penang High Court had ruled that an officer facing a disciplinary proceeding under General Order 26 must be given an opportunity to be heard in mitigation before punishment is imposed on him. Construing the ruling in *Alan Noor* to be merely

obiter, he ruled that the failure to give the plaintiff in that case a right to mitigate on sentence before punishment was fatally flawed as the punishment itself involves a further decision making process, in the sense that it was still open to the disciplinary authority to consider whether to impose the more serious penalty of dismissal or the less serious reduction in rank.

With respect, I am not with his Lordship on this point — for the following reasons.

Firstly, the decision in Alan Noor was clearly not an obiter dicta, but a ratio decidendi which I am bound to follow — that unless the disciplinary authority had stated in its show cause letter to the plaintiff in that case that the proceeding taken against him was with a view to dismissal or reduction in rank, another chance must be given to him to plead in mitigation. Failure to do so in that case rendered the proceeding bad. It follows from the judgment that if it had been so stated, the plaintiff need not be given any such chance.

Secondly, at least in the context of the instant case, to say that the punishment itself involves a further process of decision making is not entirely correct. The disciplinary authority had already made up its mind (which it must under O 26) when it issued the show cause letter to the plaintiff that the action was commenced with a view to his dismissal. It was of course, still open to the authority acting under O 26(3) to impose a lesser punishment if after hearing the plaintiff, decides that he deserves any less. But that would be entirely at the sole discretion of the authority which it may exercise without having to hear any further from the plaintiff. It did not involve any decision-making process that would call into question the corresponding right of the plaintiff to be heard to the extent that a failure to hear him further could be construed as a procedural impropriety.

Thirdly, in my considered view, a plea in mitigation on sentence exists only in a trial in a court of law which employs a distinct form of procedure where the hearing is restricted to determining the guilt of an accused. A separate less formal inquiry is conducted after he is found guilty by the court to enable the appropriate sentence to be passed. It is only at this stage that the accused is allowed to plead in mitigation. But a disciplinary inquiry is not a trial. The officer is only required to exculpate himself as provided under O 26(2). He is at liberty to plead for a lesser punishment but this must be incorporated in the representation he wants to make to the authority to exculpate himself. There could, therefore, be no question of a denial of his right under art 135(2) of the Constitution or under O 23 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980.

Fourthly, the disciplinary procedure under the General Orders does not provide for a separate plea of mitigation before sentence. The legislature had not intended it to be so. There is no room for judicial creativity as the General Orders is sufficiently comprehensive on this aspect. To read into the orders such a right is unwarranted and is a derogation of the duty of the court to interpret the procedure according to the legislative intent of Parliament.

A As Lord Shaw of Dunfermline in *Local Government Board v Arlidge* [1915] AC 120 at p 138, speaking of the duty to act fairly observed:

> ... If a statute prescribes the means it [the deciding authority] must employ them. If it is left without express guidance it must still act honestly by honest means. In regard to these certain ways and methods of judicial
B procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded. This is expressly applicable to steps of procedure... .

C

Whether the disciplinary committee may act on report of the supervisor

In the context of the present case, the question to ask is whether it is permissible for the Lembaga to rely on the report of the supervisor to
D decide on the plaintiff's guilt without having to investigate the incident by itself.

To answer this novel submission, it may be appropriate for a start to turn to HWR Wade & CF Forsyth, the learned authors of *Administrative Law*, (7th Ed) for the following passage at pp 548–549:

E

> Where the deciding authority is a minister or central government department, it must be assumed that Parliament intends the department to operate in its usual way, so that the minister's duties may be performed by a subordinate official. In other cases, the courts allow some relaxation of the normal rule which requires statutory powers to be exercised by the precise person or body
F on whom they are conferred and makes it impossible for them to be legally exercised by others, eg sub-committees. The Privy Council has held that a dairy board, in making zoning orders affecting milk producers, may appoint a person or persons to receive evidence and submissions from interested parties; and that if, before deciding to make an order, the board is fully informed of the evidence and submissions, there will be no breach of natural justice. In
G some circumstances, it was added, an accurate summary of the evidence and submissions might suffice ...
>
> There is no breach of natural justice if the deciding authority appoints a committee to investigate and report, then discloses the report to the person affected and gives him a fair hearing before itself. There is here no delegation of any of the authority's powers or duties.

H

The above passage relates to the higher function of ministers or central governments where the necessity to delegate must invariably occur. It may not be directly relevant in a scenario where no impediments exist to justify the delegation of duties. But the passage illustrates the point that even in cases where the law requires that the exercise of statutory powers must be
I performed by a specific body, it is still permissible to allow that duty to be undertaken by a committee appointed by that body.

But the Lembaga, in the instant case, is in a stronger position. Within the framework of the General Orders, there is no requirement that the Lembaga must conduct ground investigation by itself on the charges against the officer. On the contrary, its function in a disciplinary proceeding is only to sit in judgment after receiving a complaint of misconduct of an officer. This is clear from the language of O 24, O 25 and O 26. In fact, such an investigation lies with the person to whom the officer is subordinate which in the instant case, was the supervisor. This is implicit in the preceding O 22 which is as follows:

> (1) It is the duty of every officer to exercise disciplinary control and supervision over his subordinates and to take appropriate action in every case of breach of the provision of these General Orders including unsatisfactory work or conduct.
>
> (2) Failure to do so shall deem the officer guilty of inefficiency and renders him liable to disciplinary action.

Examining the decision for substance — Whether proper inquiry was held to determine the truth of the allegation against the plaintiff

The supervisor of the hospital, Ong Lee Hui (DW2), had in his evidence categorically stated that he conducted an investigation into the incident, in the course of which he had interviewed patients in the special ward free of pressure. He also interviewed the plaintiff and the other personnel who were alleged to be involved in the incident. He said he was able to confirm that the plaintiff had punched and kicked the patient Lee Heng Siong on the two occasions as mentioned in his report (Agreed Bundle 1 at pp 9 to 14).

The culpability of the plaintiff was specifically stated in his letter dated 20 July 1988 which he submitted together with his report to the Director of the Hospital recommending that disciplinary action be taken against him. The letter read together with the facts in the report clearly provided the jurisdiction for the director to act to commence disciplinary proceedings against the plaintiff.

There is, therefore, no truth in the plaintiff's allegation that no proper inquiry was held to determine the truth of the allegation against him. On the contrary, having examined the supervisor's report for substance, it is clear to me that the Lembaga had sufficient materials to find that the plaintiff committed the acts mentioned in the two charges. That the patient Lee Heng Siong was beaten twice by the plaintiff on two incidents was apparent in the interviews the supervisor conducted with two persons (as they appear in the report) one of whom was the victim himself. The other was another patient called Mahmud who corroborated the victim's statement with regard to the first incident.

In the first incident which occurred at 9.30 pm on 19 June 1988, the victim had said that the plaintiff had kicked and punched him while another 'Pembantu Hospital Rendah', Rosli, held him. He was then tied to his bed.

A In the second incident which occurred at 2.30 am on 20 June 1988 (five hours later), the victim had said that the plaintiff had beaten him with a rubber hose while he was trying to free himself from the bed.

The supervisor's report also disclosed that the medical examination which was conducted on the patient on the morning of 20 June 1988 at B 8.00 am, found mild swelling on the left side of the face, bruise behind the right ear, bruise mark over abdomen and lower chest. They were consistent with beatings inflicted with a rubber hose.

The supervisor's report, it is clear to me, was not one-sided. It included not only the interview with the patient accuser but also with the C accused including the plaintiff. It had provided the Lembaga with both sides of the story to enable it to consider whether the plaintiff had exculpate himself on the two charges.

The duty of the Lembaga in the disciplinary proceedings was to meet the demands of fairness within the province of the General Orders. The D opportunity to make written representations as had been accorded to the plaintiff in the instant case, has been held to be sufficient compliance with the demands of fairness (*Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280 at p 290).

In coming to its finding, the Lembaga had not asked the wrong E question or come to a wrong decision. Nor had it acted perversely or based its decision on no evidence. It was free to come to a decision of its own on the facts presented to it and unless it had committed any of the procedural improprieties described earlier, its decision would not be subjected to judicial review. In the words of Lord Brightman in *Puhlhofer & Anor v Hillingdon London Borough Council* [1986] AC 484 at p 518 (reaffirmed in F *R Rama Chandran*):

> ... Where the existence or non-existence of a fact is left to the judgement and discretion of a public body and the fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament G has entrusted the decision-making power ...

Scope of this judgment

At the commencement of hearing, it was agreed between the parties that this suit should be heard together with Civil Suit No 21–48–91. The claims H in both are similar. They arose from the same incident and are represented by the same counsel. Both the plaintiffs were dismissed from Hospital Bahagia based on the same report of the supervisor although separate disciplinary proceedings were conducted.

For the sake of simplicity and the saving of time and costs, it was agreed I that the court should proceed to hear evidence only in respect of the instant case but that the decision, one way or other, should also bind Civil Suit No 21–48–91.

The order

Both Civil Suits No 21–17–90 and 21–48–91 are dismissed with costs.

Suits dismissed with costs.

Reported by Lynette Tan Ping

End of Volume 7